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# **Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland**

Kath Murray and Lucy Hunter Blackburn

## **Abstract**

Within the last two years, respective proposals by the Scottish and UK Governments to reform the Gender Recognition Act 2004 (GRA) to allow people to change their legal sex based only on making a legally-registered self declaration have sparked an intense debate on how sex and gender identity should be defined in law and policy. This paper examines how gender self identification had in fact become a feature of Scottish policy-making and practice, long before public consultation on GRA reform began. The analysis is structured as two case-studies that examine firstly, policy development on the census in relation to the 'sex' question, and second, Scottish Prison Service policy on transgender prisoners. The analysis shows that the unregulated roll-out of gender self-identification in Scotland has taken place with weak or non-existent scrutiny and a lack of due process, and that this relates to a process of policy capture, whereby decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population. The paper raises questions about the adequacy of institutional safeguards against well-organised and highly purposeful lobbying, particularly where any groups detrimentally affected do not have effective representation.

Keywords: sex; gender self-identification; policy capture; Equality Act 2010; women's rights

## **Introduction**

Within the last two years, respective proposals by the Scottish and UK Governments to reform the Gender Recognition Act 2004 (GRA) to allow people to change their legal sex based only on making a legally-registered self-declaration have sparked an intense debate on how sex should be defined in law and policy, and the relevance of the concept of 'gender identity'. In Scotland, proposals to change the sex question in the 2021 census to one about gender identity have intensified this debate further, prompting arguments as to whether biological sex remains relevant as an analytical category, or if self-reported gender identity is the more relevant concept in any context where a distinction between women and men is regarded as justified in law, policy or practice. This paper considers how gender self-identification, without any requirement that a person has gone through any form of legal process, had already become a feature of Scottish policy-making and practice long before public consultation began on reforming the GRA. The main body of analysis is structured as two case-studies. The first study traces policy development on the 'sex' question in the census, and the recent Scottish Government proposal to reframe this as a sex and gender-identity question. The census is of particular relevance to the current debate because decision-making in this area may set a precedent for how sex is understood as a policy and legal category in Scotland. It also has significant implications for the future operation of the Equality Act 2010, as well as the types of data that are collected by public authorities and researchers. The second case-study examines Scottish Prison Service (SPS) policy on transgender prisoners. Focusing on vulnerability and privacy concerns,

our analysis shows how SPS decision-making failed to consider the impact on both female prisoners and prison officers. Each study draws from a range of documentary sources including published reports, parliamentary records, media reports and information accessed under Freedom of Information (FoI) legislation. It should be noted that these are not isolated cases. While space limitations preclude further analysis, other examples where gender self-identification has replaced sex include NHS patient records (MacLennan, 2018), NHS ward allocation (NHS Forth Valley, 2014), local government equalities policies (MurrayBlackburnMackenzie, 2018), the management of leisure services (Herald, 2019), recording in the criminal justice system (MurrayBlackburnMackenzie, 2019a), guidance for women's services (LGBT Youth Scotland and Scottish Trans Alliance, 2015) and guidance for supporting transgender children in schools (Herald, 2018).

The terms which should be used to describe people is a central point of contention in this debate. For the avoidance of doubt, this article seeks to explore the degree to which current policy understandings and practice accord (or not) with the Equality Act (2010), a cornerstone of equalities legislation. This requires interpretation, and careful use, of some key terms. Section 11 of the Act notes that the protected characteristic 'sex' concerns 'reference to a man or to a woman'. Section 212 (1) defines men and women as 'male' and 'female', e.g. "'woman" means a female of any age'. Section 7 defines 'Gender Reassignment' as a protected characteristic separate from 'sex'. This offers protection for 'transsexual persons', that is those who are 'proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'. Taken together, therefore, we read the Equality Act as defining 'women' as 'female', and 'female' being defined in terms which include physiological attributes. For consistency of usage this paper uses 'sex' to mean physical sex as observed and recorded as birth; 'legal sex' to bring within the definition of sex those with a Gender Recognition Certificate (GRC) who have changed their sex in law. The paper uses 'women' to mean people who are both biologically and legally female: other terms currently in use for this group are natal women, biological women and 'cisgender' women.<sup>1</sup> We use 'gender self-identification' to mean the situation where a person seeks to be recognised as a woman (or man), although their biological sex is male (or female). We are aware that some will disagree with our interpretation of meaning. Some may even find them offensive: that, for example, our defining 'women' as 'female' or associating women with particular physiological attributes is discriminatory. Yet we base these definitions on our reading of the Equality Act itself. Readers who are uncomfortable with some of the terms we use, and how we use them, might reflect upon our key contention that contemporary policy practice may have evolved some distance from the Act. This is precisely the issue we seek to investigate and the policy drift that puzzles us.

The paper argues that the unregulated roll-out of gender self-identification in Scotland has happened with inadequate scrutiny and without due process, and that this can be explained in terms of policy capture (OECD 2017: 9), whereby decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population. While presented as inclusive and progressive, the analysis shows that policy capture on gender identity has undermined the rights and interests of women.

To begin, part one introduces the respective arguments for policy-making based on biological sex and gender identity, discusses the tension between these two positions, and makes the case for the continued relevance of sex as an essential policy and legal category. For further context, we also

outline the main provisions of the Equality Act 2010 in relation to the protected characteristics of sex and gender reassignment, and the protections available in law to each group.

### **1. Biological sex, women's rights and the rise of gender self-identification in Scottish policy-making**

Over the last 150 years women have gained significant legal rights, previously denied on the basis of their sex. In 1975 Harold Wilson's Labour government passed landmark legislation to address sex discrimination in work and education, and unequal pay. Defining a woman as 'a female of any age', the Sex Discrimination Act 1975 stated that 'A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if on the ground of her sex he treats her less favourably than he treats or would treat a man.' This definition of 'woman' was carried forward to the Equality Act 2010 which identifies 'sex' as a protected characteristic and set out further rights to single-sex services and spaces, in some circumstances.

The fundamental argument underpinning these gains is that the physical and social consequences of being born and living with a female body are so significant that women need specific protections in law and policy. Sex-based disadvantages may relate directly to female biology, for example, pregnancy and maternity discrimination, child-birth mortality, female genital mutilation and female infanticide. The so-called 'gender pay gap' is largely a 'motherhood penalty' (TUC and IPPR, 2016), while sexual violence and domestic abuse can be related to the lower status ascribed to the female class.

Despite robust evidence to show that biological sex remains relevant to women's experiences of discrimination, within the last two decades a different understanding of what it means to be a woman or a man has taken hold within Scottish policy-making, and elsewhere, premised on ideas about gender identity. Gender identity may be understood as either a person's strong sense of how 'masculine' or 'feminine' one is, or a person's own belief about whether one is a man, woman or non-binary (Stock, 2018). The terms 'social gender' or 'lived identity' are sometimes also used to describe what is argued should be recognised as an alternative to biological sex.

Neither gender identity nor 'gender' are defined in law (the Equality Act 2010 s7 (1) refers to 'Gender reassignment', see also Freedman, 2018: col. 2). Despite this, in policy-making the concept of gender, as a subjective matter of self-identity, has increasingly taken precedence over sex, as officially recorded at birth based on observed physical characteristics. The Scottish Government 'Equality Evidence Finder' refers to gender instead of sex, and the accompanying notes on collecting information erroneously state that 'The Equality Act 2010 protects people from discrimination because of gender' (Scottish Government, 2012a). In 2018 the Convention of Scottish Local Authorities (COSLA) instructed its officials to replace 'sex' with 'gender' in formal documents and correspondence, in line with the Scottish Government position, which was 'moving towards a non-binary definition' (Times, 2019). And in 2019 a Scottish Government spokesperson described terms such as biological woman or man as pejorative, instead preferring 'cisgender' to avoid discrimination on the basis of gender identity (Ibid.).

The prioritisation of self-identified gender over biological sex remains controversial, due principally to a deep-seated tension between a framing of transgender rights as based on beliefs about a person's gender identity, and women's rights as based on sex. From a transgender rights perspective the key line of argument is that a person who identifies with a gender that differs to their sex should

be treated in line with the gender with which they identify (although there are other views within the transgender population [see Hayton, 2019]). Thus, a transwoman should be treated as a woman and a transman as a man, with access to female and male single-sex services respectively. However, the prioritisation of self-declared gender identity within policymaking represents a departure from the key principles which have underpinned advances in women's rights, and carries significant implications for how female inequality is addressed. As Stock (2019) argues, the dismissal of sex as a relevant policy tool 'leaves us with no adequate language to describe a politically important feature of material reality', undermines our ability to 'track actual facts about sex, as it operates across various social groups, practices and discourses', and describe the effects of sexism and misogyny. From a legal and policy perspective, the argument that a transwoman should be treated as a woman sits uneasily with the Equality Act 2010, as it renders sex irrelevant as a protected characteristic. As detailed next, while the Act does allow trans people access to single-sex services, this is not unconditional and single-sex services providers may exclude trans people providing certain tests are met.

### **Equality Act 2010: Sex and gender reassignment**

The Equality Act 2010 is the main piece of law protecting particular groups ('protected characteristics') from direct or indirect discrimination, harassment or victimisation in England, Wales and Scotland. These are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Act sets out circumstances in which organisations can direct their services towards people with a particular protected characteristic, and lawfully exclude people who do not share the same protected characteristic. The Act also requires public authorities to uphold the Public Sector Equality Duty (PSED) in relation to the protected characteristics, namely to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, promote equality of opportunity between people who share a protected characteristic and those who do not, and foster good relations between people who share a protected characteristic and those who do not (Equality and Human Rights Commission, 2019).

Under Section 11, 'sex' is a protected characteristic. For almost everyone this is biological sex, as originally recorded on a person's birth certificate. There are also around 5,000 people across the UK who have obtained a Gender Recognition Certificate (GRC) which allows a person to change the sex on their birth certificate (Government Equalities Office, 2018). For those with changed birth certificates, a distinction can be drawn between their legal sex, as recorded on their current birth certificate, and biological sex as recorded on their original birth certificate:

In UK law, 'sex' is understood as binary, with a person's legal sex being determined by what is recorded on their birth certificate. A trans person can change their legal sex by obtaining a GRC. A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes. (Equality and Human Rights Commission, 2018)

Eight exemptions in the Act give employers, service providers, associations and charities the right to treat people differently on the grounds of sex, and to provide single-sex spaces or services. These exemptions can be invoked for (biological) women only. While people with a GRC are generally entitled to use such services in line with their new legal sex, Schedule 3 allows service providers to

exclude GRC holders if it can be shown this is proportionate and meets a legitimate end. Schedule 9 similarly allows employers to limit certain roles to those who have a particular sex by birth.

Under Section 7, 'gender reassignment' is also a protected characteristic. This is defined as anyone who 'is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'. While this protects people against discrimination on the basis on gender reassignment, it does not change a person's legal sex. The Act also does not provide that those with the characteristic of gender reassignment have a general right of access to single-sex spaces and services based on gender self-identification, despite a common and influential assumption that it does.

Gender reassignment and sex are separate protected characteristics, which means that wherever the single-sex exemption is invoked, the protected characteristic of gender reassignment is not relevant, just as the other protected characteristics are not relevant. In such circumstances legal males may be excluded, including trans women without a GRC, just as males with any other protected characteristics can be excluded.

A trans person is protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. (Ibid.)

Provided it is 'a proportionate means to a legitimate end', a transgender person with a GRC can also be excluded, even though they share the same legal sex as other participants. The Notes on the Act (s9) give the following example: 'A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.'

There is still not however, full consensus on how the Act should work. Dunne and Sharpe (2019) argue that single-sex changing policies that exclude all trans people from single-sex changing facilities are contrary to law because this constitutes direct discrimination under the protected characteristic of 'gender reassignment'. This argument hinges on the understanding that the bar for lawful exclusion using the sex-based exemptions is high: '[e]ven in relation to a rape crisis centre or domestic violence refuge, meeting this test is far from guaranteed' (Ibid.). More recently, a multi-signatory letter to The Herald newspaper asserted that 'the right of trans people to access gender specific services is an already settled legal matter' (Spear et al., 2019). These arguments are not however consistent with the EHRC advice noted above, which indicates that only those with a GRC have any legal basis for seeking admission to single service provision. Lobbying by organisations such as Stonewall and the Scottish Trans Alliance to fully remove the single-sex exemptions in relation to services and public services (Schedule 3) and work (Schedule 9) further suggest that the current law represents a legal barrier to those with the protected characteristic of gender reassignment (Stonewall, 2017: 30).

In practice, many organisations and service-providers within Scotland already operate on the basis of gender self-identification, thereby ignoring the protections based on sex available in the Equality Act. For some, this is a conscious choice to provide 'inclusive' services, although such decisions may be shaped by Scottish Government funding arrangements that are conditional on including

transwomen (Engender, 2018a: para. 2.4). As Monaghan QC (2018) notes, there is also confusion as to how the Equality Act should operate: 'The much bigger problem is that women running women-only spaces, such as rape crisis centres and refuges, are very unclear about their entitlement to exclude trans women in certain circumstances'. Taking a case-study approach, the remainder of this paper argues that informal roll-out of gender self-identification policies in Scotland can also be explained in terms of policy capture, whereby decision-making has been shaped by a reference to a limited group of interests that have excluded those of women.

## **2. Census 2021**

Undertaken every 10 years, the Scottish census provides an official estimate of every person and household in Scotland. The main purpose is to provide information that governments need 'to develop policies, plan and run public services, and allocate funding' (Office for National Statistics, undated). Census data is also used to monitor the effectiveness of the Equality Act in relation to sex and other protected characteristics, and for research purposes. As Scotland's census administrator National Records of Scotland (NRS) explain, the census programme itself is a major undertaking:

The planning and execution of the census operation is vast and complicated and the processing and production of the data complex and time consuming. It is a costly exercise to undertake - the whole 2011 Scotland's Census Programme cost just under £64 million – and one which everyone is required by law to participate in. We need to be sure that we are collecting the right information in the best and most efficient way (2015: 5).

In late 2018 the Scottish Government introduced the Census (Amendment) (Scotland) Bill, aimed principally at introducing new voluntary questions on sexual orientation and, separately, on the transgender population. More controversially, the Bill also sought to amend the Census Act 1920 by reframing the question on sex as one about gender identity. NRS suggested that the sex question should contain a third response option, for those who do not believe themselves to be either male or female. In practice, this meant that the 'sex' question would, for an unpredictable number of people, collect data on a different class of information (i.e. gender identity).

The argument for changing the sex question hinged on the rights of trans and non-binary people<sup>2</sup> to answer the sex question in a way that aligned with their gender identity. This was supported by the assertion that the previous 2011 census had operated on the basis of self-identification, as noted in the Bill policy memorandum:

The 2011 Census recognised that society's understanding of sex has changed and guidance provided explained that the question was being asked in terms of self-identified sex. Looking forward to 2021, consultation has identified the need for a more inclusive approach to measuring sex. The sex question being proposed for the 2021 Census will continue to be one of self-identification and will provide non-binary response options. Importantly, the sex question proposed will not seek a declaration of biological or legal sex. (Scottish Parliament, 2018; para. 16)

During evidence at Stage One of the Bill, it was suggested that the ability to self-identify sex dated back to the 2001 census in England and Wales (which is administered by the Office for National Statistics, separately to Scotland). Equality Network Director, Mr Tim Hopkins stated:

in 2011 the 1 per cent of people who are trans were told to answer it according to the sex that they believed themselves to be. In fact, the Office for National Statistics issued guidance for the England and Wales census for 2001 that said the same thing, so this has been going on for two decades. (2018: col. 25)

The purported introduction of gender self-identification principles by the ONS in 2001, and by both census authorities in 2011 (ONS and NRS), allowed those advocating reform to argue that gender self-identification would maintain consistency with previous years. At Stage One the Cabinet Secretary for Culture, Tourism and External Affairs Fiona Hyslop (2018: col. 31) stated: 'Consistency is important, which is why there is an argument for consistency with the 2011 census'. Yet without a clear audit trail or evidence of due process, it remained unclear how the principle of gender self-identification had come about, or how far the changed advice had influenced responses to the question, which on the face of the actual census form continued to ask only if a person was male or female (Figure 1).

### **Below the parapet: Census policy development 1999 to 2011**

Archived reports on the England and Wales census suggest that a piecemeal shift towards gender self-identification came about in the late 1990s, prompted by an enquiry from a member of the trans rights campaign group Press for Change (PfC) as to how a transgender person should answer the sex question. In response, an Office for National Statistics (ONS) official wrote: 'it would be reasonable for you to respond by ticking either the "Male" or "Female" box whichever you believe to be correct, irrespective of the details recorded on your birth certificate' (cited in Diversity Solutions, 2008, p.8). Viewed by PfC as breaking with previous practice, the advice was shared on their website: '[the letter] makes it clear that trans people can **now** give an answer which is both truthful and legal' (Ibid. p.7 bold in original). It is not known however, if or how far the advice was shared with other campaign groups or individuals, or if it was shared in Scotland.

The principle of gender self-identification appeared to gain further traction in the 2011 England and Wales, and Scotland censuses, via the publication of online guidance that advised those with transgender or transsexual status to 'select the option for the sex that you identify yourself', irrespective of birth certificate details or possession of a Gender Recognition Certificate. Some background to the development of the 2011 guidance is provided in an Equality Impact Assessment Screening (EIAS) report by independent consultancy Diversity Solutions (2008). For the purposes of the assessment, Diversity Solutions consulted with the same PfC campaigner who had queried the sex question on the 2001 census. The assessment also drew uncritically from a census Demography, Families and Household topic group statement, which framed the existing sex question in terms of gender, and which noted that a private individual wanted the right to record themselves as non gendered. The EIAS recommended that ONS issue clear guidance to trans people allowing them to respond with their self-identified gender, which was erroneously framed as a 'statutory duty to promote gender equality', and consult with trans community groups 'such as the Gender Trust and Press for Change, which work on behalf of adult trans people', noting also that it was 'essential to consult with Mermaids, to capture the views of younger trans people and their parents' (Ibid. p. 5.). Despite significant implications for the legal understanding of sex, the assessment did not recommend consultation with those representing women's interests, and stated that 'it would be a



disproportionate use of resources to conduct an equality impact assessment on the sex question’ (Ibid. p.3.)

While the 2011 guidance appeared to signal a more formal shift in how sex is defined, it is not clear how significant or influential this was, given that the guidance was not published on the face of the census form, nor is known how far it was disseminated. Subsequent ONS and NRS publications suggest that the change may not have been widely recognised or understood within either organisation. In a nod to biological sex, a 2014 ONS report on the England and Wales census stated that the sex question represented ‘the classification of a person as either male or female and is used to produce statistical breakdowns of the population by sex, and for equality monitoring’ (Office for National Statistics, 2014). Similarly, a 2018 NRS Sex and Gender Identity Topic Report noted ‘sex is a protected characteristic as set out in the Equality Act 2010 and the data are widely used to inform equality impact assessments’ (National Records of Scotland, 2018a: 3). More confusingly, a 2016 ONS report on sex and gender identity, based on a workshop with public officials and LGBT representatives suggested that the question remained ambiguous and that there was a need ‘to review the instructions around the sex question, particularly where the sex question is asked without a gender question’ (Office for National Statistics, 2016).

### **2021 Scotland census: consultation and question testing**

Topic consultation on the 2021 Scotland census began in late 2015, and identified a ‘user need’ to collect data on gender identity (or reassignment), and sexual orientation, as well as a continued need to align data on sex with the binary definition in the Equality Act for equalities monitoring purposes (National Records of Scotland, 2016: 17). A separate proposal to change the sex question to a non-binary sex format, based on ‘respondent need’, was taken forward from a stakeholder meeting in early 2017, attended by government officials and representatives from three LGBT organisations: Equality Network, LGBT Health and Stonewall (National Records of Scotland, 2017a: 2). As NRS reported:

Stakeholders identified a respondent need for changing the 2011 binary sex question in that the 2011 sex question which is mandatory does not allow non-binary people to answer the question truthfully. A non-binary self-identified sex question allows those who do not identify as either male or female to tick a third response option and write in how they identify. People who are trans are also able to tick the response option for how they identify rather than their having to disclose their sex assigned at birth e.g. a trans man may self-identify as male.

(National Records of Scotland, 2018a: 9)

Aimed only at affirming personal identity, the proposed change did not seek to collect usable data on those with non-binary identities. As Equality Network Director Tim Hopkins explained at a Stage One evidence session, the third option was ‘not to ensure that trans people can be counted but to give non-binary people an option that they can truly answer so that they do not have to be dishonest by ticking either the male or the female box’ (2018: col. 40) and for related privacy reasons (Ibid. col. 37). With the expectation that the number of non-binary responses would be low, for the purposes of data management NRS agreed to randomly assign these into binary male and female categories, thereby maintaining consistency with previous censuses.

During the question design and testing process. NRS officials did not consult with women’s groups or representatives, while cognitive question testing with ‘communities of interest’ was based on 23

individuals, recruited exclusively via LGBT groups. The Equality Impact Assessment (EQIA) on the Bill also made no conclusion about the potential impact on those with the protected characteristic of 'sex', instead grouping the separate protected characteristics of 'sex' and 'gender reassignment' under one heading. Quantitative testing considered three different question formats: a binary sex question, a non-binary sex question, and a two-step question that asked about both binary sex and gender identity. It is, however, difficult to draw robust conclusions on the testing process, based on the available information. Only limited consideration was given to developing a two-step format, even though such an approach would collect data on both categories, provide more information about the population as a whole (as per the purpose of the census), and maintain consistency with the Equality Act. With the binary format apparently eliminated on the basis of 'respondent need', NRS thus concluded:

Testing has supported the view of stakeholders that a non-binary sex question is more acceptable and produces less item non-response than a question set comprised of a binary sex question followed by a gender identity question. (National Records of Scotland, 2018: 3).

### **Discussion on Census**

The fragmented introduction of gender self-identification principles, via correspondence in the 2001 census, and online guidance in the 2011 census, carried significant implications for future legal and policy interpretations of sex, equalities monitoring, and other data gathering exercises by way of precedent. It also had significant implications for data quality. Despite this, no EQIA was undertaken, and we have found no evidence of wider consultation beyond the transgender community. Moreover, the recommendation underpinning the 2011 guidance was based on flawed legal advice. A substantial failure of process in this period means that for an unknown and unknowable group of people it will never be clear what type of data on sex was collected in the 2001 and 2011 censuses. That the Culture, Tourism, Europe and External Affairs (CTEEA) Committee was unaware that guidance had even been issued in 2011, thus prompting the convener to seek clarification from the NRS, further underlines the opacity of these changes.

While decision-making in relation to the 2021 census is more readily auditable, compared to 2011, question development and testing was nonetheless shaped by reference to a limited set of interests that excluded those of women. These dynamics, which can reasonably be viewed as evidence of policy capture, help to explain first, the apparent commitment to a sex question based on gender self-identification, despite the lack of clear measurement criteria and related risks to data quality (for data user views, see Scottish Parliament, 2018). Second, the decision to limit testing on separate sex and gender identity questions, despite the advantages of such an approach. And third, the decision to randomly assign any non-binary responses to male or female categories, instead of using established statistical techniques to adjust for bias and account for the fact the transgender population is not randomly distributed across the population (MurrayBlackburnMackenzie, 2019b).

Although badged as inclusive, the current attempt to put the principle of gender self-identification on a statutory basis risks setting a legal precedent that will challenge the very basis of the Equality Act 2010. If the argument that it is wrong in principle for organisations to identify a person's legal or biological sex is applied more widely, it will make the practical operation of the Act unworkable in relation to the protected characteristic of 'sex'. In the context of the census, the argument for gender self-identification as based on privacy (Hopkins, 2018: col. 37) can be offset by the strict

statutory confidentiality controls on census data (National Records of Scotland, 2018b), as well as ongoing collection of data on sex by the 47 countries covered by the European Convention of Human Rights, none of which as yet collect data on gender identity in their census (Office for National Statistics, 2017: para. 5.5). Nonetheless, without space for counter arguments or alternative voices in the policy-making process, the idea that subjective identity should supersede sex remains a powerful policy driver.

In December 2018, a UK Government White Paper stated that the 2021 England and Wales census would retain a binary sex question due to concerns about data quality, and for the purposes of equalities monitoring (2018: paras. 3.43 and 3.83). In February 2019, the Stage One report on the Scottish Bill also recommended retaining the established binary format, with the Committee Convenor describing the legislation as ‘not fit for purpose’ (Scottish Parliament, 2019). The Stage One report further criticised the conflation of sex and gender identity in the proposed sex question, and lack of wider consultation with women’s groups. At the time of writing the Scottish Government is still to state whether it will accept the recommendation, and if it does, whether a binary sex question should collect data on biological or legal sex as per the definition used in the Equality Act and elsewhere, or if it will seek to formally embed gender self-identification principles in policy and law.

### **3. Scottish Prison Service**

The Scottish Prison Service (SPS) states that its principal objective is to protect the public and reduce offending through the ‘delivery of secure custody, safe and ordered prisons, decent standards of care and opportunities for prisoners to develop in a way that help them reintegrate into the community on release’ (Scottish Prisons Service, undated).

In March 2014 the SPS published its Gender Identity and Gender Reassignment Policy for those in our Custody (Scottish Prison Service, 2014a). Introducing the policy, Chief Executive Colin McConnell described it as ‘one of the most comprehensive of its type and represents the culmination of years of dedicated partnership work by a diverse group of criminal justice sector and equality sector organisations’ (Ibid. p. 2.). While concerning the safety and wellbeing of two vulnerable groups, decision-making focused exclusively on the vulnerability of transgender prisoners, to the detriment of both female prisoners and prisoner officers. Two areas in particular raise questions about the impact on female prisoners and staff: accommodation and intimate searches.

#### **Prison Accommodation**

The SPS policy on gender self-identification provides that ‘the person in custody’s gender identity and corresponding name and pronouns must be respected’ so that the accommodation chosen ‘should reflect the gender in which the person in custody is currently living’ (Ibid. p. 6.). This is determined by whether a person is ‘still living predominantly in the gender assigned at birth’ or ‘permanently living in their new social gender instead’ (Ibid.). Living permanently in a new social gender is defined as using ‘their new name, title and pronoun in all their everyday social interactions with strangers, service providers, friends and family’ and having changed the name and gender on documents (except birth certificates) (Ibid.). Living in a new gender does not require surgery or other physical changes.

A transgender person who has not undergone genital surgery and identifies as a man may ask to be placed in the women's estate 'due to high level of concern about sexual assault risk in a male establishment' and 'he should be kept out of association until an urgent case conference responds in detail to his request' (Ibid. p. 25.). The policy for the specific situation of a transgender prisoner identifying as a woman who has not undergone genital surgery is quoted in full below, given its particular relevance here:

A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody. However, if there is clear evidence that she, as an individual, may pose a sexual offence risk, then this should be dealt with as for any other person in custody posing a risk. Only where a risk assessment determines it is justified, should she be subject to increased staff supervision or restrictions of her association with other people in custody. (Ibid. p. 26. emphasis in original)

The policy provides in addition that 'all the standard risk assessments and management procedures ... should be carried out as for any other person in custody' (Ibid. p. 6.). This provision could override the general stipulation of accommodation in line with gender self-identity for reasons of security, for example. Transgender prisoners are not normally expected to be placed in shared cells, although they may be if this is assessed as 'sufficiently safe and provides sufficient privacy for both the transgender person in custody and the other person in custody' (Ibid. p. 25.). Staff are instructed to not reveal information about a prisoner's gender reassignment to other prisoners, which means that a woman prisoner will not be told that she is being required to share with someone who is physically male, nor will staff be able to confirm whether this is the case if asked.

A decision on accommodation is required within seven days of reception (or of a request to transition from an existing prisoner not previously identified as transgender) that must consider 'the safety, dignity and privacy of the person in custody (and others where relevant)' (Ibid. p. 22.). The meeting to agree this must be attended by the prisoner, a range of SPS staff, including the local equality and diversity manager, social work and, if the person in custody wishes, a representative of a transgender organisation. When 'for reasons of safety and risk management' the prisoner's preferred accommodation is not chosen, the decision is not treated as final and regardless of the grounds, should be reviewed at case conferences held 'at least monthly for the first three months' (Ibid. p. 22.).

### **Prison: Intimate searches**

Rubdowns and body searches are to be conducted 'in accordance with the gender in which the person in custody is currently living, rather than their physical characteristics' (Ibid. p. 6). If a person's gender is unclear, the prisoner must be asked whether they wish to be searched by a woman or a man and this must be respected. If staff are concerned about performing such searches, the policy advises this should be 'initially addressed through the provision of additional staff training and information about gender reassignment and equality requirements' (Ibid. p. 26.). If a case conference has already determined whether any searches should be conducted by a woman or a man, this must be complied with (Ibid. p. 33.). If a prisoner's behaviour during searching is inappropriate in any way this should be treated like any other breach of rules, by placing the

prisoner on report (Ibid. p. 33.). The policy does not say whether inappropriate conduct can be grounds for search decisions to be suspended or reversed.

If not declared on admission, the prison service will not necessarily know that a prisoner is transgender. Transgender prisoners in that category are de facto outside the policy, unless and until their status becomes known. The policy does not address what should happen in cases where staff feel they have reasonable grounds to suspect a new prisoner is declaring an identity different from their sex at birth, but the prisoner denies this. If such a person has a GRC and has changed their birth certificate, the policy provides that this person cannot be required to declare this status. It is therefore unclear by what process, if any, the SPS could deny a male-bodied person who has a GRC but declines to declare this, a place in the women's estate, unless they require accommodation only available in the male estate.

### **Prisons: Policy development and consultation**

Policy development appeared to involve a narrow range of stakeholders, with no input from women's representatives. The document's front cover carried with equal weight the logos of the SPS and the Scottish Trans Alliance (STA), as well as a Stonewall Diversity Champion mark. In autumn 2018, the document's lead authorship came under scrutiny, when it emerged via social media that the metadata for the document stated James Morton, the Director of the Scottish Trans Alliance as the author (Sinclair, 2018). The policy document itself does not directly list those involved in its production, although all organisations involved would be expected to be among those consulted on the accompanying EQIA, which were listed as: 'trans people in prison and in the community', SPS Managers, Officers and Legal Branch, the 'Trade Union' (presumably the Prisoner Officers' Association), Government Agencies (including Scottish Government and the Prison Service in England and Wales), the Scottish Transgender Alliance, Stonewall Scotland and Capability Scotland (a disability charity) (Scottish Prison Service, 2014b: 3). While the EQIA template included a generic list of potential consultees that includes one women's organisation and prisoner focus groups, neither are mentioned as having been consulted (Ibid.). The EQIA was not available on an otherwise exhaustive list of EQIAs on the SPS website and was only made public following a FOI request (Scottish Prison Service, 2018).

Stating that the policy change 'should not have a detrimental effect on any protect (sic) characteristics in the Equality Act or any Human Rights Articles' (Ibid. p. 9.), the EQIA identified three 'protected characteristics' that could be affected: age, gender identity (the EQIA pro forma uses this term rather than the Equality Act wording 'gender reassignment') and sexual orientation. While noting that 'transferring a person to a prison that matches their social gender has risks attached' and that 'SPS Searching of a trans person could mean a change in policy' (Ibid. p. 12.), the box for 'gender' (used instead of the Equality Act term, 'sex') was left blank, implying neither of these points was seen as relevant to female prisoners or staff. In a list of evidence considered 'relating to equality groups', the EQIA does not reference the Report of the Commission on Women Offenders (known as the Angiolini Report), published less than two years previously, which had clearly laid out the vulnerability of female prisoners (Scottish Government, 2012).

In the assessment of positive and negative impacts, the EQIA notes 'There are vulnerable people in prison when faced by a trans person (pre operation) might induce fear to that person' (sic) (Scottish Prison Service, 2014b: 7), without specifying that such people are likely to be overwhelmingly, if not

exclusively, female. By way of mitigating action, the EQIA states only that 'SPS will take steps to support vulnerable and trans people' (Ibid.). While there is some acknowledgement that accommodating transgender prisoners to reflect their identity rather than their sex might at least sometimes be in conflict with the welfare of other prisoners, the EQIA nonetheless fails to explicitly recognise any sex-specific issues:

A potential negative impact for a trans person is the SPS have a duty of care to everyone in our care ... this potential could be discriminatory against a trans person and stop transfers to prison to support a person living in their social gender however this is a proportionate means of achieving a legitimate aim in supporting the health, safety and welfare of individuals in Prison (sic). (Ibid. p. 8–9.)

Although the Angiolini Report had observed 'women offenders themselves are often victims of severe and repeated physical and sexual abuse' (Scottish Government 2012: 3), policy-development was strongly predicated on an assumption that bringing people into the women's estate who would previously have been held in a men's prison would not significantly impact on female prisoners. Similarly, despite recognition that the search provisions could 'mean a change of policy', it was assumed without any formal assessment that giving prisoners a greater say in whether they wish to be searched by a male or female officer would have no negative effects for female staff.

### **Prisons: Transgender policy in practice**

Operation of SPS transgender prisoner policy remains opaque, with most information in the public domain accessed by Freedom of Information and/or media reports. There are no routine statistics published on the number of transgender prisoners in Scotland, or how many prisoners transition before or after reception into prison. In late 2018, an online news site reported that the number of transgender prisoners had increased from six to thirteen between April 2016 and April 2018, and increased further to twenty by the end of 2018 (Ferret, 2018). Of these, fifteen were reported to identify as women and five as men. Official figures show there were typically around 400 women and 7,400 men in prison in 2018, although it is not clear whether these figures are based on sex as recognised in law, self-identity or the type of establishment a person is held in. Whichever applies, transgender people identifying as women were equivalent to just under 4% of the reported number of women in prison, and those identifying as men equalled less than 0.1% of the reported number of men.

No information is routinely published on how the policy operates in relation to accommodation placements. In February 2018 James Morton of the Scottish Trans Alliance observed that 'Most trans women in custody are safely held in single cells in the female estate, where they are closely monitored and shower separately' (Sunday Post, 2018). However, more recent figures suggest that prisoners are more likely to be accommodated according to birth sex than identity. Media reports suggest that in December 2018, of the 15 transgender prisoners who identified as women, nine were held in the male estate and six in the female estate: of those identifying as men, four out of five were held in the female estate (Ferret, 2018). An FoI response issued in November 2017 noted that at that date, two-thirds of the 18 transgender prisoners at that time had requested a transfer to a prison which reflected their new identity, but fewer than five had been transferred (Scottish Prison Service 2017a). Morton's statement that those who do transfer are kept separate for certain activities (such as showering) and are closely monitored appears to call into question how far the

policy's stipulation that there should be no additional constraints on association for transgender prisoners, unless specific prison rules are invoked in an individual case, is observed in practice.

There are no publicly-available data on patterns of transfer out of the female estate, making it impossible to know how common it is that placements are not successful. No case has been reported in Scotland analogous to that of Karen White, convicted in England in 2018 of sexual assaults on other inmates after transfer to a women's prison, while on remand for charges of rape (Independent, 2018). Morton has stated that 'the majority of trans women in Scottish Prison Service custody have been held in the female estate and none have harmed female prisoners' (Sunday Post 2018). Unhelpfully, the SPS does not hold information on whether any incidents have occurred of transgender prisoners who have transferred to woman's prison facilities going on to commit violence against female inmates, which is considered 'a matter for the Procurator Fiscal' (Scottish Prison Service, 2017a). Although some past or present transgender prisoners have convictions for sexual assault (BBC, 2018), in November 2017 SPS (2017a) advised that no transgender prisoners who had transferred into the women's estate at that point had such convictions.

In May 2019, campaigners Women and Girls in Scotland (WGS) published a document detailing ways in which female prisoners had experienced negative impacts from transgender prisoners transferred into the women's estate. Based on information allegedly shared with WGS by prison staff, these included examples of sexualised and aggressive behaviour (Women and Girls in Scotland, 2019).

The general impact on female prisoners of introducing into the women's estate prisoners who would previously have been held in the male estate, does not appear to have been systematically monitored in any way, despite potentially significant impacts not only on women's physical safety, but also on their sense of safety, both physical and psychological. These considerations are clearly exacerbated in a context in which prisoners do not have the freedom to leave, as well as a high likelihood of having experienced domestic abuse. While comparable figures are not available in Scotland, a survey of female prisoners in England and Wales found that 57 per cent of female inmates have been victims of domestic violence (Prison Reform Trust, 2017). There is also no publicly available official information on how the policy change has affected female staff, although a media report relating to a prisoner with a history of extreme violence, held in the men's estate, suggested that female staff had refused to perform intimate searches, although required to do so, and that the trade union had become involved in their case (Mirror, 2016).

### **Discussion on Prisons**

While policy on transgender prisoners concerns the safety and well-being of two groups of prisoners both usually regarded as vulnerable, the decision-making process only treated the vulnerability of transgender prisoners as relevant, even though the Angiolini report had recently highlighted the vulnerability of female prisoners. In some parts of the EQIA, a failure to name certain potential impacts as especially relevant to women is hard to understand, given the difficulty of reading these as having equal relevance for the male and female estate. Without accessible data or information, it also remains unclear how the policy works in practice.

The low value placed on female prisoners is exemplified by differential provisions for transgender prisoners who have not undergone genital surgery. On the one hand, a transgender person's fear that male prisoners would be able to tell they were physically female, regardless of their identity, is seen as real, and capable of justifying a move to the women's estate. On the other, female prisoners

are either assumed incapable of recognising a transgender prisoner's physical sex, or the perception of maleness and any fears it might induce is treated as unimportant or unjustified. The most vulnerable women are obliged to accept without question or choice, the decision that gender identity overrides sex, even as the policy (rightly) accepts that female-bodied transgender people placed in the men's estate might have rational fears.

The guidance assumes that possession of a GRC is irrelevant to decisions on choice of accommodation or other treatment, except insofar as a GRC confers greater rights of privacy over personal information, and criminal sanctions for breaching these. This differs from England and Wales, where GRC holders are described as having a clearer legal entitlement to be held in the estate of their new legal sex, subject only to the same security assessments as apply to female prisoners generally (National Offender Management Service, 2017). The Scottish policy is by contrast silent on whether any specific additional rights in relation to accommodation (or searches) are conferred on GRC holders and the legal status of words such as 'must' and 'should' in particular situations is unclear. For a policy in the criminal justice system, it allows the law to be surprisingly blurred.

In an organisation with substantial responsibilities of care, SPS policy on transgender prisoners can be reasonably described as a clear example of policy failure that is explicable through the lens of policy capture. Recent statements from the SPS suggest it now recognises its original processes were flawed. No reference was made to assessing the impact on female prisoners or staff when the possibility of a review was first raised in 2017 (Scottish Prison Service: 2017b: 25), however by late 2018 the impact of on female prisoners had become an unavoidable issue after substantial UK-wide interest in the White case, as well as critical media commentary in Scotland on SPS policy (Times, 2018). In December 2018, an online media article reported that the SPS intended to consult on its policy, quoting an SPS spokesperson as saying: 'One of the groups we will be particularly keen to consult is the female prison population, who have not been specifically consulted about this before. There is an obvious interest and locus for those individuals' (Ferret 2018, emphasis added). Nonetheless, at the time of writing, this single unsourced media report appears to be the only public statement or information available on the proposed review.

#### **4. Conclusion**

Over recent years policies that represent a profound conceptual change in our understanding about what it means to be a woman have been introduced in Scotland without due diligence, democratic oversight or scrutiny. This paper has discussed in detail two examples where gender self-identification quietly gained traction in this way. As noted earlier, these are not isolated cases, nor are they accidental. James Morton (Scottish Trans Alliance) has commented, 'We strategized that by working intensively with the Scottish Prison Service to support them to include trans women as women on a self-declaration basis within very challenging circumstances, we would be able to ensure that all other public services should be able to do likewise' (2018: 233), noting further, 'the learning from our prison work has made it much easier to assist other Scottish public services, such as NHS wards and schools, and to also respect trans people's gender identities' (Ibid., 234).



## **Due process and democratic policy-making**

The achievement of gender self-identification has been conceived by its advocates as an essential element of gaining full respect for the rights of transgender people, and the vigour with which it has been pursued needs to be understood in that light. Campaigners' promotion of gender self-identification in an unregulated form, ahead of any changes to the law, has had a substantial impact across public services in Scotland.

Although badged as inclusive, the way these changes have been made have failed women and girls, whose interests have consistently been left out of the policy development process. Public authorities have often failed to assess properly the impact on other groups who have specific protections under the Equality Act 2010, as the Act requires, or to consider intersections, for example between sex and religion. Little thought appears to have been given to the possibility that such policies might be open to abuse by individuals with malign intent, irrespective of gender identity. As gender self-identification becomes more common, either by law or, as in Scotland, without legal change, there is evidence to suggest that failing to anticipate such abuse is naïve (Freedman, 2019). While proponents of GRA reform maintain that the unregulated introduction of gender self-identification in Scotland has not led to any problems, this remains unsubstantiated, principally because organisations have not systematically gathered information on the impact of the changes already made. This is evident in both the accounts of census and prison policy above, as well as other policy areas. While a joint submission from a group of Scottish women's organisations to the Scottish Government consultation on GRA reform states that violence against women organisations have had trans inclusion plans in place for six years, and that this 'has not given rise to any concerns or challenges of which we are currently aware' (Engender, 2018a para. 24), no systematic work seems to have been done to establish how this change has been experienced by women using these services, or whether some women might be self-excluding as a result of these policies. For women's services as well as for prisons, a less problem-free picture has been painted by Women and Girls in Scotland (2019).

That such a paradigm shift has taken place without formal scrutiny or proper monitoring, far ahead of legal change, raises a serious question as to why there has been such a persistent failure to consider the possible wider impacts of gender self-identification, especially on women. On one analysis, this simply reflects that women remain, as a group, less powerful than men. From another perspective, this may be read as a story of policy capture that demonstrates how easily systems can be influenced by determined organisations or interest groups, particularly in a small nation. Viewed this way, the analysis shows how a small number of influential actors appear to have secured a monopoly on how sex and gender identity are understood within Scottish policy-making. The analysis also highlights the failure of institutional safeguards (such as EQIAs) designed to ensure that public policies are consistent with the law. Although outwith the scope of this paper, that a number of the organisations promoting gender self-identification receive a substantial percentage of their funding from the Scottish Government or other statutory bodies, and the degree to which this is relevant to the question of policy capture, also deserves further exploration. For example, in 2017/18 the Equality Network (2018: 19) received 92% of its total income from the Scottish Government.

Policy capture has serious social and political consequences. In the case of gender self-identification, it has led to a clear failure to recognise the full range of interests affected. At the wider political

level, policy capture can decrease trust in government and erode legitimacy (OECD, 2017: 2010). The OECD (2017) advises organisations that they should identify and mitigate against policy capture by fostering a culture of integrity and accountability, setting clear standards of conduct and facilitating inclusive decision-making. In this respect, it is troubling that some women have not felt able to articulate their concerns about gender self-identification for fear of repercussions, including loss of employment (Morrison, 2019; Forstater, 2019). This is now a significant challenge for the Scottish Government, which needs to find a way to allow for open debate. The dynamics and processes which have allowed this change to happen on such a scale with so little scrutiny for so many years, also deserve much closer attention, not just to understand the specific vulnerabilities of women's rights, but also the vulnerabilities of democratic policy-making more generally to single-minded ideologically-driven lobbying.

## Notes

1. 'Cisgender' is used to refer to a person whose sense of gender identity aligns with their biological sex. The term is highly contested and rejected by those who critique the underpinning assumption of innate gender identity.
2. 'Non-binary' is the most commonly used term for those who reject being classed as one or other of male/female or man/woman.

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